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FEDERAL COMMUNICATIONS COMMISSION
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**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554**

In the Matter of

Petition of the People of the)
State of California and the)
Public Utilities Commission of)
the State of California)
Requesting Authority to)
Regulate Rates Associated)
with the Provision of Cellular)
Service within the State)
of California)

PR Docket No. 94-105

**COMMENTS OF LOS ANGELES CELLULAR TELEPHONE COMPANY
ON PROPOSED PROTECTIVE ORDER**

Los Angeles Cellular Telephone Company ("LACTC"), by its attorneys, hereby opposes the National Cellular Resellers Association's ("NCRA") "Request for Access to California Petition for State Regulatory Authority Pursuant to the Terms of a Protective Order ("NCRA Request") in the above-captioned proceeding. In response to the NCRA Request, the Commission released a Draft Protective Order ("Draft Order"), to which it solicits comments. See Public Notice, DA 94-1083, released September 30, 1994.

LACTC welcomes any objective review of information relevant to the California Petition for State Regulatory Authority ("Petition") of the Public Utilities Commission of the State of California ("CPUC"). LACTC is certain that such an objective review will reveal that the market for cellular services in

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California is indeed competitive and that certain CPUC policies in fact have had an anticompetitive effect. Moreover, LACTC is willing to consider alternatives¹ to a protective order in order to both aid the Commission in reaching a just decision and at the same time protect the confidential information of LACTC and the other carriers from disclosure that may harm competition.

I. The Request for Comments on the Proposed Protective Order is Premature.

Once again LACTC and the other California cellular carriers are being asked to engage in shadow boxing, this time by responding to a proposed protective order regarding proprietary information that has not been disclosed to them. LACTC and the other carriers have only seen the redacted version of the CPUC Petition. Although LACTC submitted confidential and proprietary information to the CPUC, neither LACTC nor any California carrier knows what particular information pertaining to it has been filed with the FCC in this proceeding. Accordingly, even if the Commission had the authority to require carriers to disclose the information pursuant to a protective order, there can be no meaningful comment on the proposed Draft Order simply because the carriers have no idea what confidential information the order proposes to protect.

¹ For example, public disclosure of aggregated information might be preferable to the Protective Order, so long as it can be ensured that the information is independently and objectively compiled.

The only way in which LACTC can reasonably respond to the Draft Order is if it first has the opportunity to review the proprietary and confidential information about itself contained in the CPUC Petition. Therefore, each carrier should be allowed to review all proprietary and confidential information pertaining to it prior to negotiating or entering into a proposed protective order. In addition, if there is aggregated information the carriers should be informed of the manner in which it was compiled. After reviewing its own proprietary information, LACTC may determine that some or all of the confidential information submitted is not subject to disclosure at all, even under a protective order.² Similarly, LACTC may discern that certain of the submitted data is already publicly available, which would make a protective order unnecessary. It could also become evident that some of the data was not accurately compiled or depicted, whereupon LACTC would likely object to the release of such information. In any event, until the proprietary information has been reviewed by the relevant carriers, no such decisions can be logically or reasonably made. Such prior review is the minimum required by common sense and due process.

² See e.g., In the Matter of J. David Stoner on Request of Inspection of Records, 5 FCC Rcd. 6458, 6459 (1990) (Commission found that information should not be disclosed under Exemption 4 of the Freedom of Information Act ("FOIA") because such disclosure would significantly diminish the cooperation of carriers in voluntarily submitting information in the future).

It is ironic that the NCRA has proposed a protective order under which it will be allowed to review confidential material that the carriers themselves have not yet seen. This irony highlights the impropriety not only of the NCRA Request, but also of the posture of this entire proceeding. LACTC and the other California carriers submitted information to the CPUC under conditions of confidentiality. Notwithstanding its request for proprietary treatment of data provided by the carriers, the CPUC violated that confidentiality by passing the information on to the FCC without the knowledge or consent of the carriers.

A Commission mandated protective order in this situation is not authorized by the Commission's rules, which contemplate confidential data being submitted to the FCC only by the party to which the information belongs.³ Indeed, under normal conditions, where the carrier itself chose to submit the information to the FCC, that carrier is given an opportunity to withdraw the

³ See 47 C.F.R. § 0.459. Consequently, LACTC has found no case in which the Commission ordered disclosure of confidential information belonging to a party when that party was not the actual submitter of the information. See e.g., In the Matter of Motorola Satellite Communications, Inc. of Ellipsat Corp., TRW Inc. and Constellation Communications, Inc., On Request for Inspection of Records 7 FCC Rcd 3593 (1992) (Protective order issued covering records submitted by Motorola in the proceeding); In the Matter of MCI Telecommunications Corp., On Request for Inspection of Record, 58 RR2d 187 (1985) (Request for review of records submitted by AT&T in the proceeding granted pursuant to a protective order).

information rather than have it disclosed to a third party.⁴ Here, LACTC and the other carriers are denied any such right because the CPUC has no interest in protecting carriers from improper disclosures. Further, unlike in California, disclosure here would be for any entity willing to sign the protective order, even if the entity had no connection to the cellular marketplace in California.

Further, no disclosure of the confidential information redacted from the CPUC Petition is warranted. First, California filed its Petition with full knowledge that this Commission can rely only on public available information in making its decisions. The law is clear and well established.⁵ Nevertheless, the CPUC elected to include in its Petition confidential information submitted under seal that the CPUC had no right to disclose. The CPUC later filed a Supplemental Petition in which it disclosed selected redacted material that it concluded was not confidential.

In short, the CPUC chose to rely on its Petition, as filed and supplemented, with full knowledge that by law the Commission may rely only on publicly available information in making its decision. That should be the end of

⁴ 47 C.F.R. § 0.459(e).

⁵ National Black Media Coalition v. FCC, 791 F.2d 1016, 1023 (2d Cir. 1986) ("it is not consonant with the purpose of a rulemaking proceeding to promulgate rule on the bases of inadequate data or data that [in] critical degree is known only to the agency") (quoting United States v. Nova Scotia Food Prods. Corp. 586 F.2d 240, 251 (2d Cir. 1977)).

the matter. Since the redacted material cannot be a basis for the Commission's decision, there is no reason to make it available to any other party or to the public.

II. Data Gathered by the California Attorney General That CPUC Submitted in its Petition is Not Subject to Disclosure.

At least some of the information which the CPUC submitted to the Commission in this proceeding consists of material gathered by the California Attorney General's Office in an apparent investigation of California's mobile and wireless communications services. LACTC does not know what information, if any, about it or other carriers gathered in the Attorney General's investigation is included. Nonetheless, disclosure of any information gathered in this investigatory setting would be wholly improper and a violation of criminal law.⁶

California law strictly prohibits any disclosure by the CPUC of material from the Attorney General's ongoing investigation. The Attorney General obtained that material under investigative subpoenas issued under California Government Code Section 11180-11191. The Government Code requires that such material be treated confidentially and in no event permits disclosure to other parties. Such material may be disclosed only to certain

⁶ The CPUC's disclosure of confidential data obtained from the California Attorney General may constitute a criminal violation under California Government Code Section 11183.

prosecutors and governmental agencies responsible for enforcing laws related to unlawful activity uncovered by the investigation.

Thus, it appears that the disclosure by the California Attorney General's Office to the CPUC and the CPUC's further disclosure to the FCC constituted violations of these Government Code provisions. Disclosure to the public or any party in this proceeding of such materials would only compound these violations. Even to the extent that Parties may have produced materials in response to the Attorney General's investigative subpoenas, they did so in reliance on the Government Code's strict disclosure prohibitions. A protective order notwithstanding, any disclosure would be patently unfair to those parties.

In addition, Section 0.457(g) of the Commission's rules specifically provides for the Commission to withhold "[i]nvestigatory records compiled for law enforcement purposes, to the extent that production of such records would: (1) [i]nterfere with enforcement proceedings; [or] (2) deprive a person of a right to fair trial or an impartial adjudication" ⁷ In this instance, the information gathered by the California Attorney General has not been examined by those to whom it pertains. Its truthfulness and probative value remain unsubstantiated and untested. Disclosure of this information would seriously compromise the ability of the California cellular carriers to obtain a fair adjudication in any proceeding

⁷ 47 C.F.R. § 0.457(g) (1) and (2).

that flows from the California Attorney General's investigation and also in this proceeding.

Moreover, it would be improper to disclose this information in any setting other than a public adjudicatory proceeding in the State of California where proper rebuttal can take place (provided that the California Attorney General even deems such information sufficient to warrant adjudicatory proceedings). All such information should be stricken from the FCC record and returned to the California Attorney General. Any FCC disclosure or reliance on this information, even under a protective order, would be tantamount to denial of the right of cross-examination in a judicial proceeding and would violate the basic tenets of due process as well as California law and the Commission's own rules.

III. The Proposed Protective Order Affords Inadequate Protection of the California Cellular Carriers' Confidential and Proprietary Information.

In spite of LACTC's handicap in attempting to respond to the Draft Order without first knowing the nature and content of the confidential information at issue, the facial inadequacies of the Commission's Draft Order require LACTC to make at least some comment. Attached as Attachment A is a comparative version of the Draft Order depicting LACTC's proposed changes. The changes, at a minimum, are needed to ensure that the rights of the Parties are adequately

protected regardless of the nature of the Confidential Information. The following comments explain the reasons for such changes.

1. As explained above, under no circumstances should material gathered in the California Attorney General's investigation be subject to any disclosure. Thus, LACTC proposes deleting references to such material in the definition of "Confidential Information" in paragraph 1 of the Draft. The same is true for proposed paragraph 2(e). See paragraph 2 of LACTC Proposal. LACTC also submits that proposed paragraphs 1 and 2 are inconsistent in that they purport to propose two different definitions of "Confidential Information". Therefore, LACTC proposes transposing paragraphs 1 and 2 and clarifying that the redacted information constitutes "trade secrets" under FOIA.

2. Paragraph 3 of the Draft Order provides for access that is far too broad. The reference to legal staff access on a "need to know" basis in paragraph 3(a) is so vague as to be ineffective in delineating which persons should and should not have access to protected materials. This is also true for the reference to "employees of the Parties" in paragraph 3(b). Rather, access should be limited to the Parties' counsel and persons working with counsel on this specific matter. In addition, any protective order must ensure that the resellers and other competitors who access the Confidential Information prevent their marketing staffs from reviewing it because of the unlikelihood that such personnel

could disassociate themselves from such information in performing their daily functions. Consequently, LACTC proposes new paragraphs 3(a)-(c), which actually are replicas of the ALJ's Modification Ruling. See paragraph 3 of the LACTC Proposal.

3. While paragraph 4 of the Draft Order requires counsel to retain custody of the Confidential Information, proposed paragraph 6(c) would apparently allow other persons to have custody thereof and requires disclosure of their names to the FCC. LACTC asserts that counsel should maintain custody and control of the confidential materials at all times, and that any person who legitimately needs to view the information do so in counsel's offices. See paragraph 4 of LACTC's Proposal. This will best protect the carrier's legitimate privacy interests should any protective order be warranted.

4. In paragraph 5 of the Draft Order, LACTC proposes that relevant information which has been independently developed may not include any information developed by a person who has had access to or knows of the contents of the confidential information at issue here. LACTC also suggests that persons to whom information is disclosed under the protective order's terms, referred to in paragraph 6(b), also be required to consent in writing to be bound by those terms. Further, in accordance with LACTC's comments on Paragraph

4, the clause in paragraph 6(c) of the Draft Order, which refers to other persons taking "actual physical control" of confidential documents, should be deleted.

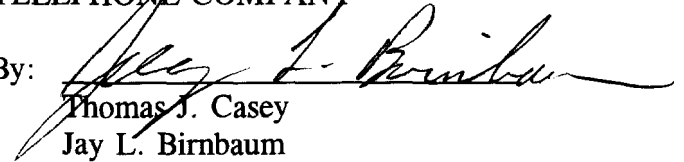
5. In both subparagraph 7(d) and paragraph 9 of the Draft Order, any further disclosure or other direction by the Commission must be subject to proper notice to the parties of the proposed disclosure and a reasonable opportunity to comment on such proposed disclosure. The terms of any protective order governing confidential information are meaningless unless the Commission is not also bound and constrained by it. LACTC proposes adding a clause to that effect. See paragraphs 7(d) and 9 of LACTC Proposal. Moreover, in paragraph 9 the disclaimer allowing the Commission to disclose any information "where the public interest so requires" is confusing and unnecessary. It

undermines the purpose and terms of the Draft Order. LACTC therefore suggests that this sentence be replaced with the attached language.

Respectfully submitted,

LOS ANGELES CELLULAR
TELEPHONE COMPANY

By:



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Its Attorneys

Dated: October 7, 1994

ATTACHMENT A

PROTECTIVE ORDER

Adopted: ; Released:

By the Chief, Private Radio Bureau:

~~1. For purposes of this Order, "Confidential Information" shall mean and include trade secrets and commercial or financial information which is privileged or confidential under Exemption 4 of the Freedom of Information Act, 5 U.S.C. § 552(b)(4), as well as material claimed to be gathered in an ongoing antitrust investigation of the cellular industry by the Attorney General of the State of California (Investigation).~~

2 1. Confidential Information submitted herein by the People of the State of California and the Public Utilities Commission of the State of California (California) shall be segregated from all material filed and deemed non-confidential as generally set forth in the pleadings filed publicly by California on August 9, 1994, and subsequent revisions filed on September 13, 1994, in PR Docket No. 94-105. "Confidential Information", as redacted, for purposes of this Order shall consist of:

a. Market share data as contained in Pages 29 to 34 of the unredacted Petition of the People of the State of California and the Public Utilities Commission of the State of California To Retain State Regulatory Authority Over Intrastate Cellular Service Rates (Petition) and Appendix E thereto. The data on page 29 is disaggregated by carrier, and on pages 30-35, aggregated by market. Some data on page 30 is further aggregated by combining data in two markets. The data in Appendix E is aggregated as to resellers by market, and disaggregated for cellular carriers.

b. Capacity utilization figures as contained in pages 50-53 of the Petition, and in Appendix M. This data is aggregated for the Los Angeles market on page 51 and Appendix M-1, and disaggregated as to specific carriers on pages 52-53 of the Petition and Pages M-1 to M-3 of Appendix M.

c. Financial data per subscriber unit including revenues, operating expenses, plant, operating income, subscriber growth percentages for 1989-93, found in Appendix H to the Petition. This data is disaggregated as to specific cellular carriers.

d. Number of customers per year, per rate plan, both wholesale and retail as contained in Appendix J to the Petition. This data is disaggregated as to specific cellular carriers.

~~e. Material redacted from pages 42, 45 and 75 of the Petition which California claims to have been gathered in the investigation.~~ 2. Such "Confidential Information" shall be deemed to constitute trade secrets and commercial or financial information which is privileged or confidential under Exemption 4 of the Freedom of Information Act, 5 U.S.C. § 552(b)(4).

3. Confidential Information may be disclosed to:

~~a. to counsel for the Parties listed herein after in Appendix A (Parties) and their associated attorneys, paralegals and clerical staff predicated on a "need to know" basis.~~ An attorney appearing for NCRA in this proceeding who is not representing or advising or otherwise assisting resellers in devising marketing plans to compete against cellular carriers; or

~~b. to specified persons, including employees of the Parties, requested by counsel to furnish technical or other expert advice or service, or otherwise engaged to prepare material for the express purpose of formulating filings in connection with PR Docket No. 94-105.~~ b. An attorney, paralegal, and other employee associated for purposes of this proceeding with an attorney described in (a) who is not representing or advising or otherwise assisting resellers in devising marketing plans to compete against cellular carriers; or

c. An unaffiliated expert or an employee of an unaffiliated expert retained by NCRA for the purpose of advising in this proceeding, except those persons who are directly involved in or have direct supervisory responsibilities over the development of reseller marketing plans to compete against cellular carriers.

4. Under no circumstance shall counsel permit custody or control over the Confidential Information to pass to any other persons. Review can only be done in counsel's offices. Counsel may request the Commission to provide one copy of Confidential Information (for which counsel must, as a prerequisite, acknowledge receipt pursuant to this Order), and counsel may thereafter make no more than two additional copies but only to the extent required and solely for the preparation and use in this proceeding, and provided further, that all such copies shall remain in the care and control of counsel at all times. Following the filing of Further Comments on ____, 1994, counsel shall retain custody of the Confidential Information until such time as it is necessary to prepare additional filings in connection with PR Docket No. 94-105 in the discretion of counsel. If such additional filings are necessary, counsel shall retain custody of the Confidential Information following submission of such additional filings. Counsel shall return to the Commission within forty-eight hours after the final resolution of PR Docket No. 94-105 all Confidential Information originally provided by the Commission as well as all copies made, and shall certify that no material whatsoever derived from such Confidential Information has been retained by any person having access thereto, except that counsel may retain copies of pleadings submitted on behalf of clients.

5. Confidential Information shall not be used by any person granted access under this Order for any purpose, other than for use in this proceeding, and shall not be used for competitive business purposes or otherwise disclosed by such persons to any other person except in accordance with this Order. This shall not preclude the use of any material or information in the public domain or which has been developed independently by any other person so long as that person, or any person working with such person, has not had access to such Confidential Information or otherwise learned of its contents.

6. a. Counsel inspecting or copying Confidential Information shall apply for access to the materials covered by this Order under and by use of the "Attorney Application For Access To Materials Under Protective Order" appended to this Order.

b. Counsel may disclose Confidential Information to persons to whom disclosure is permitted under the terms of this Order only after advising such persons of the terms and obligations of this Order and obtaining such person's written consent to be bound by its terms.

c. Counsel shall provide to the FCC and, in the absence of a need for confidentiality, to California, the name and affiliation of each person other than counsel to whom disclosure is made ~~or to whom actual physical control over the documents is provided.~~ To the extent that anyone's name is not disclosed to California, that fact shall be disclosed to the FCC and California.

7. Parties may in any pleadings that they file in this proceeding, reference the Confidential Information, but only if they comply with the following procedures:

a. any portions of the pleadings that contain or disclose Confidential Information are physically segregated from the remainder of the pleading:

b. the portions containing or disclosing Confidential Information are covered by a separate letter referencing this Protective Order:

c. each page of any Party's filing that contains or discloses Confidential Information subject to this Order is clearly marked "confidential information included pursuant to Protective Order, DA 94-___."

d. the confidential portion of the pleading shall be served upon the Secretary of the Commission, California and the other Parties and not placed in the Commission's Public File, unless the Commission directs otherwise to put it in the Public File upon notice to the Parties with an opportunity to comment on such proposed disclosure. The Parties may provide courtesy copies to the Legal Advisor to the Private Radio Bureau Chief, who will distribute the copies to the appropriate Commission personnel.

8. Disclosure of materials described herein shall not be deemed a waiver by California or any other Party in any other proceeding, judicial or otherwise, of any privilege or entitlement to confidential treatment of such Confidential Information. Inspecting parties, by

viewing said documents: (a) agree not to assert any such waiver; (b) agree not to use information derived from any confidential materials to seek disclosure in any other proceedings; and (c) agree that accidental disclosure of privileged information shall not be deemed a waiver of the privilege.

9. The entry of this Order is without prejudice to the rights of California or the other Parties to apply for additional or different protection where it is deemed necessary or to the rights of the Parties to request further or renewed disclosure of Confidential Information. Moreover, it in no way binds the Commission from disclosing any information where ~~the public interest so requires.~~ required by applicable law upon notice to the Parties with an opportunity to comment on such proposed disclosure.

~~10~~ 11. This Order is issued under Section 0.331 of the Commission's Rules, 47 C.F.R. § 0.331, and is effective on its release date.

FEDERAL COMMUNICATIONS COMMISSION

Ralph A. Haller, Chief
Private Radio Bureau

APPENDIX A

PARTIES

AirTouch Communications

American Mobile Telecommunications Association, Inc.

Bakersfield Cellular Telephone Co.

Bay Area Cellular Telephone Company

California Public Utilities Commission, People of the
State of California

Cellular Agents Trade Association

Cellular Carriers Association of California

Cellular Resellers Association, Inc.

Cellular Telecommunications Industry Association

County of Los Angeles

E. F. Johnson Co.

GTE Service Corporation

Los Angeles Cellular Telephone Company

McCaw Cellular Communications, Inc.

Mobile Telecommunications Technologies Corp.

National Cellular Resellers Association

Nextel Communications, Inc.

Paging Network, Inc.

Personal Communications Industry Association

Utility Consumers' Action Network & Towards Utility Rate
Normalization

US West Cellular of California

CERTIFICATE OF SERVICE

I, Katherine T. Wallace, do hereby certify that true copies of the foregoing "Comments of Los Angeles Cellular Telephone Company on the proposed Protective Order" were sent this 7th day of October, 1994, by first-class United States mail, postage prepaid, to the following:

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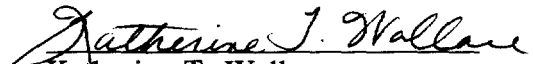
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